

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
<b>CITY OF NEW YORK</b>	:	DETERMINATION
for Review of Orders Granting Refunds of Mortgage	:	DTA NOS. 816772,
Recording Tax under Article 11 of the Tax Law with	:	816773, 816774
Reference to Instruments Recorded on January 12, 1995,	:	AND 816775
August 23, 1991, May 11, 1992, and January 20, 1995.	:	

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Petitioner, City of New York c/o City of New York Law Department, 100 Church Street, Room 5-208, New York, New York 10007, filed petitions for review of orders granting refunds of mortgage recording tax under Article 11 of the Tax Law with reference to instruments recorded on January 12, 1995, August 23, 1991, May 11, 1992 and January 20, 1995.

On March 8, 1999, petitioner by its representative, Michael D. Hess, Esq. (Robert J. Firestone, Esq., of counsel) and on March 11, 1999, the Division of Taxation by Terrence M. Boyle, Esq. (Laura J. Witkowski, Esq., of counsel) waived a hearing and agreed to submit the matter designated DTA # 816772 (Imperial Ocean Corp.) for determination. On March 29, 1999, petitioner by its representative, Michael D. Hess, Esq. (Robert J. Firestone, Esq., of counsel) and on April 1, 1999, the Division of Taxation by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel) waived a hearing and agreed to submit the three matters, designated DTA # 816773 (Marion Court Equities Corp.), DTA #816774 (84 Equities Corp.), and DTA #816775 (9602 Owners Corp.), respectively, for determination. All documents and briefs were

to be submitted by the parties<sup>1</sup> by December 3, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Michael D. Hess, Esq. (Robert J. Firestone, Esq., and Frances J. Henn, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel). After review of the evidence and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether the Division of Taxation properly refunded mortgage recording taxes paid by certain New York City cooperative housing corporations on the refinancing of their respective underlying first mortgages to the extent that the total indebtedness on their respective properties was not, in fact, increased.

### ***FINDINGS OF FACT***

1. Petitioner, the City of New York, has challenged the orders of refund of mortgage recording tax issued by the Division of Taxation (“Division”) (i) on August 3, 1998 to Imperial Ocean Corp., a cooperative housing corporation which owned real property located at 540 Ocean Parkway in Brooklyn, in the amount of \$15,867.50, (ii) on July 16, 1998 to Marion Court Equities Corp., a cooperative housing corporation which owned real property located at 62-98 Saunders Street in Queens, in the amount of \$14,007.00, (iii) on July 16, 1998 to 84 Equities Corp., a cooperative housing corporation which owned real property located at 115-25 84th

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<sup>1</sup> By an order dated April 15, 1999, Assistant Chief Administrative Law Judge Daniel J. Ranalli granted the motion of Isidor D. Friedenberg, Esq., dated January 20, 1999, which sought to join Imperial Ocean Corp., Marion Court Equities Corp., 84 Equities Corp, and 9602 Owners Corp. as parties to this matter. Imperial Ocean Corp. (DTA # 81772), Marion Court Equities, Inc. (DTA #81773), 84 Equities Corp. (DTA #81774), and 9602 Owners Corp. (DTA # 81775) were the respective mortgagors granted refunds by the Department of Taxation and Finance of mortgage recording tax with reference to instruments recorded on January 21, 1995, August 23, 1991, May 11, 1992, and January 20, 1995, respectively, challenged by the City of New York in this proceeding. Attorney Friedenberg filed a brief on behalf of these taxpayers.

Avenue in Queens, in the amount of \$7,226.00, and (iv) on July 16, 1998 to 9602 Owners Corp., a cooperative housing corporation which owned real property located at 9602 Fourth Avenue in Brooklyn, in the amount of \$8,118.00.

***Imperial Ocean Corp.***

2. The following summarizes the relevant mortgages recorded with respect to 540 Ocean Parkway in Brooklyn, the premises owned by Imperial Ocean Corp. up to the time of the refinancing of the underlying first mortgage by Imperial Ocean Corp. on December 19, 1994.

(a) On January 26, 1962, a mortgage executed by View Park Construction Corp. in favor of Prudential Savings Bank was recorded securing a principal debt of \$1,050,000.00, and a mortgage recording tax of \$5,025.00 was paid on recordation.

(b) On June 4, 1964, a mortgage executed by View Park Construction Corp. in favor of Long Island City Savings Bank was recorded securing a principal debt of \$250,000.00, and a mortgage recording tax of \$1,250.00 was paid on recordation. On this same date, this mortgage was consolidated with the mortgage recorded on January 26, 1962, on which a balance of \$1,050,000.00 remained, resulting in a total outstanding recorded debt of \$1,300,000.00.

(c) On May 11, 1983, a mortgage executed by 540 Ocean Parkway Corp. in favor of Raritan Valley Savings and Loan Association was recorded securing a principal debt of \$178,220.00, and a mortgage recording tax of \$2,673.00 was paid on recordation. On this same date, this mortgage was consolidated with the mortgages recorded on January 26, 1962 and June 4, 1964, on which a balance of \$921,780.00 remained, resulting in a total outstanding recorded debt of \$1,100,000.00.

(d) On July 3, 1985, a mortgage executed by J & M Realty Associates in favor of The Dime Savings Bank of Williamsburgh was recorded securing a principal debt of \$1,505,406.00,

and a mortgage recording tax of \$33,874.00 was paid on recordation. On the same date, this mortgage was consolidated with the mortgages recorded on January 26, 1962, June 4, 1964, and May 11, 1983 on which a balance of \$594,594.00 remained, resulting in a total outstanding recorded debt of \$2,150,000.00.

(e) A purchase money wrap-around mortgage dated November 22, 1988 was executed by Imperial Ocean Corp. in favor of J & M Realty Associates pursuant to a plan to convert the premises at 540 Ocean Parkway in Brooklyn to cooperative ownership. On February 19, 1989, this purchase money wrap-around mortgage was recorded securing a principal debt of \$909,323.00, and a mortgage recording tax of \$20,459.00 was paid on recordation. On the same date of recordation of the wrap-around mortgage, there was an outstanding balance of \$2,090,677.00 remaining on the consolidated mortgage recorded on July 3, 1985 so that total outstanding recorded indebtedness on February 19, 1989 was \$3,000,000.00. On February 19, 1989, the purchase money wrap-around mortgage securing a principal debt of \$909,323.00 was also consolidated with the mortgages recorded on January 26, 1962, June 4, 1964, and May 11, 1983, which had been consolidated earlier on July 3, 1985 as noted in subparagraph “(d)” above. As a result, on February 19, 1989, a consolidated purchase money wrap-around mortgage was recorded with a total outstanding recorded debt of \$3,000,000.00.

3. On December 19, 1994, Imperial Ocean Corp. refinanced its debt which gave rise to the present dispute. According to the brief<sup>2</sup> filed by the City of New York in these matters, “the

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<sup>2</sup> The record created by the parties is limited primarily to the petitions and answers filed by the City of New York and the Division of Taxation, respectively. The answers include the refund claims filed by each of the four cooperative housing corporations. These refund claims include the affidavits of Lawrence Krasne from which most of the findings of fact in this determination have been derived. In addition, the briefs submitted by the City of New York include many factual statements which help explain in a general fashion the transactions at issue. Unfortunately, such factual statements were not provided in an evidentiary form. However, in order to better understand the background to the refinancing of debt at issue, this particular finding of fact has relied upon the statement in petitioner’s brief concerning the right of the sponsor to cause the refinancing of debt, a fact which was

Sponsor [J & M Realty Associates], pursuant to its right under the Wrap Mortgage to later refinance any of the underlying mortgages, caused Imperial Ocean Corp. . . . to execute a mortgage in favor of Bankers Federal Savings Bank.” As a result on December 19, 1994, Imperial Ocean Corp. executed a mortgage in favor of Bankers Federal Savings FSB securing a principal debt of \$576,994.00, and a mortgage recording tax of \$15,867.00 was paid on its recordation on January 12, 1995. The sum of \$575,994.00 was advanced to J & M Realty Associates, the holder of the purchase money wrap-around mortgage dated November 22, 1988 in the amount of \$909,323.00, as noted above. On the same date of January 12, 1995, a consolidation of mortgages was also recorded with total outstanding recorded indebtedness remaining the same, i.e., \$3,000,000.00.

4. Imperial Ocean Corp. filed a claim for refund dated December 18, 1996 for the mortgage recording tax paid of \$15,867.00. It provided the following statement in support of its claim:

1. Upon transfer of [540 Ocean Parkway in Brooklyn] to [Imperial Ocean Corp.], the required mortgage tax was paid upon the recording of a *wraparound* mortgage in the principal amount of \$3,000,000.

2. On December 19, 1994, (recording date of 1/12/95) the *underlying first mortgage* was refinanced, as follows:

(i) new underlying first mortgage	\$2,500,000
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not disputed in the responding brief filed by attorney Friedenberg on behalf of the cooperative housing corporations. In addition, the initial brief of the City of New York also includes some factual information concerning wrap mortgages, once again, not in an evidentiary form but nonetheless helpful to better understand the transactions at issue. According to the City’s brief:

“A Wrap Mortgage has often been used as a means of financing property sales, where the pre-existing mortgages encumbering the property are old, and, as a result, bear a below-market rate of interest. In essence, a Wrap Mortgage allows the buyer to take the property subject to the below market rate mortgages, with the seller financing the remaining unpaid balance of the property’s purchase price (in exchange for which the seller receives a purchase-money note secured by the Wrap Mortgage). At the time the seller transfers the property, the seller takes back a single mortgage, i.e., the Wrap Mortgage, which ‘wraps,’ both the original below-market mortgages on the property and the new purchase-money note (together, the ‘underlying mortgages’).” (Petitioner’s brief, p. 2.)

(ii) less: existing underlying first mortgage	(1,923,106)
(iii) increase of underlying first mortgage	\$ 576,994 <sup>3</sup>

However, the wraparound mortgage was not increased, and the total property indebtedness remained at \$3,000,000. Nevertheless, a mortgage recording tax in the amount of \$15,867 was paid as a result of the above refinancing.

3. Pursuant to [the court decision in *City of New York v. Tax Appeals Tribunal* (231 AD2d 267, 660 NYS2d 753) which affirmed the decision of the Tax Appeals Tribunal in *Matter of 11814 Homes Corporation* (April 4, 1996)], the refinancing of the underlying first mortgage, without an increase to the wraparound mortgage, will not result in an additional mortgage tax.

4. Accordingly, a refund of \$15,867 is requested.  
(Emphasis in original.)

5. By an order of refund dated August 3, 1998, the Division directed that a refund of \$15,867.50 plus interest was warranted on the basis that the claim of Imperial Ocean Corp. “was held in abeyance . . . pending the outcome of litigation in the *Matter of 11814 Homes Corporation*” and such litigation resulted in an order to refund tax and interest to the mortgagor. The Division noted that “the facts and circumstances surrounding the claim for refund [of Imperial Ocean Corp.] are similar to those in the *Matter of 11814 Homes Corporation* (DTA 811902).”

***Marion Court Equities Corp.***

6. The following summarizes the relevant mortgages recorded with respect to 62-98 Saunders Street in the Rego Park section of Queens, the premises owned by Marion Court Equities Corp., up to the time of the refinancing of the underlying first mortgage by Marion Court Equities Corp. on August 7, 1991.

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<sup>3</sup>This amount of \$576,994.00 corresponds to the sum advanced to J & M Realty Associates as noted in Finding of Fact “3”.

(a) On August 30, 1976, a mortgage executed by Uzi Realty Corp. in favor of Marion Hall Inc. was recorded securing a principal debt of \$500,000.00, and a mortgage recording tax of \$6,250.00 was paid on recordation.

(b) On August 30, 1976, the same date of recordation as the mortgage noted in subparagraph “(a)” above, a mortgage executed by Uzi Realty Corp. in favor of Jack A. Finkel and Motel Twerski was also recorded securing a principal debt of \$112,000.00, and a mortgage recording tax of \$1,400.00 was paid on recordation.

(c) A purchase money wrap-around mortgage dated July 25, 1983 was executed by Marion Court Equities Corp. in favor of B & K Realty Associates pursuant to a plan to convert the premises at 62-98 Saunders Street in Queens to cooperative ownership. On September 1, 1983, this purchase money wrap-around mortgage was recorded securing a principal debt of \$410,205.70, and a mortgage recording tax of \$6,153.00 was paid on recordation. On the same date of recordation of the wrap-around mortgage, there was an outstanding balance of \$589,794.30 remaining on the two mortgages recorded on August 30, 1976 so that total outstanding recorded indebtedness on September 1, 1983 was \$1,000,000.00.

7. On August 7, 1991, Marion Court Equities Corp. refinanced its debt which gave rise to the present dispute. On this date, Marion Court Equities Corp. executed a mortgage in favor of Queens County Savings Bank securing a principal debt of \$654,788.46, and a mortgage recording tax of \$18,006.68 was paid on its recordation on August 23, 1991. Although the sum of \$654,788.46 was loaned as a result of this mortgage, only \$454,788.46 was advanced to B & K Realty Associates, the holder of the purchase money wrap-around mortgage dated July 25, 1983 in the amount of \$410,205.70 as noted above. On the same date of August 23, 1991, a

consolidation of mortgages was also recorded with total outstanding recorded indebtedness increasing from \$1,000,000.00 to \$1,200,000.00.

8. According to an affidavit dated August 19, 1993 of Lawrence Krasne, the vice-president of Marion Court Equities Corp., at the time of the recording of the mortgage dated August 7, 1991 which secured a principal debt of \$654,788.46, “there was an outstanding balance of \$1,000,000 remaining of the Purchase Money Wrap-Around Mortgage recorded on July 25, 1983.” However, a mortgage in the amount of \$410,205.70, as noted in subparagraph “(c)” of Finding of Fact “6”, was also described by Mr. Krasne in this affidavit as a purchase money wrap-around mortgage. Although the record is not clear, it would appear that the mortgage indebtedness in the amount of \$410,205.70 as well as the indebtedness totaling \$589,794.30, which remained on the two mortgages recorded on August 30, 1976 were secured by the purchase money wrap-around mortgage recorded on July 25, 1983.

9. Marion Court Equities Corp. filed a claim for refund dated August 19, 1993 for \$14,006.68 of the mortgage recording tax paid of \$18,007.00. It provided the following statement in support of its claim:

1. On August 7, 1991 (recoding [sic] date of August 23, 1991) the *underlying first mortgage* was refinanced as follows:

(i) new underlying first mortgage	\$1,200,000.00
(ii)less: existing underlying 1st mortgage <sup>4</sup>	(471,449.30)
(iii)less: existing underlying 2nd mortgage <sup>5</sup>	(73,762.24)
(iii)[sic] increase of underlying first mortgage	\$ 654,788.46

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<sup>4</sup> Presumably, this amount represents the balance on the mortgage securing a principal debt of \$500,000.00 executed by Uzi Realty Corp. in favor of Marion Hall Inc. as noted in subparagraph “(a)” of Finding of Fact “6”.

<sup>5</sup> Presumably, this amount represents the balance on the mortgage securing a principal debt of \$112,000.00 executed by Uzi Realty Corp. in favor of Jack A. Finkel and Motel Twerski as noted in subparagraph “(b)” of Finding of Fact “6”.



Since the wraparound mortgage balance immediately prior to the above refinancing was \$1,000,000, the outstanding property indebtedness increased by only \$200,000,<sup>6</sup> and the correct mortgage tax due is \$4,000 (\$200,000 X 2%). Nevertheless, a mortgage recording tax in the amount of \$18,006.68 was paid as a result of the above refinancing.

2. Pursuant to [the court decision in *City of New York v. Tax Appeals Tribunal* (231 AD2d 267, 660 NYS2d 753) which affirmed the decision of the Tax Appeals Tribunal in *Matter of 11814 Homes Corporation* (April 4, 1996)], the refinancing of the underlying first mortgage, without an increase to the wraparound mortgage, will not result in an additional mortgage tax.

3. Accordingly, a refund of \$14,006.68 is requested.  
(Emphasis in original.)

10. By an order of refund dated July 16, 1998, the Division directed that a refund of \$14,007.00 plus interest was warranted on the basis that the claim of Marion Court Equities Corp. “was held in abeyance by the Department of Taxation and Finance pending the outcome of litigation in the *Matter of 11814 Homes Corporation*” and such litigation resulted in an order to refund tax and interest to the mortgagor. The Division noted that “the facts and circumstances surrounding the claim for refund [of Marion Court Equities Corp.] are similar to those in the *Matter of 11814 Homes Corporation* (DTA 811902).”

#### ***84 Equities Inc.***

11. The following summarizes the relevant mortgages recorded with respect to 115-25 84th Avenue in Queens, the premises owned by 84 Equities Inc., up to the time of the refinancing of the underlying first mortgage by 84 Equities Inc. on April 16, 1992.

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<sup>6</sup> Of the \$654,788.46 loaned by Queens County Savings Bank, only \$454,788.46 was advanced to B & K Realty, the holder of the purchase money wrap-around mortgage. As a result, \$200,000.00 of the loan amount apparently became available for the use of Marion Court Equities Corp.

(a) On May 10, 1976, a mortgage executed by Jambi Realty Inc. in favor of Harwood Construction Company, Inc. was recorded securing a principal debt of \$370,000.00, and a mortgage recording tax of \$4,625.00 was paid on recordation.

(b) On July 13, 1979, a mortgage executed by 63 Associates Inc. in favor of Anton Vatauvuk was recorded securing a principal debt of \$434,619.00, and a mortgage recording tax of \$6,519.00 was paid on recordation. On July 13, 1979, there was an outstanding balance of \$343,739.00 remaining of the mortgage previously recorded on May 10, 1976, detailed in subparagraph “(a)” in this finding of fact, so that the total outstanding recorded indebtedness was \$778,358.00.

(c) A purchase money wrap-around mortgage dated January 31, 1984 was executed by 84 Equities Inc. in favor of J & M Realty Associates pursuant to a plan to convert the premises at 115-25 84th Avenue in Queens to cooperative ownership. On February 29, 1984, this purchase money wrap-around mortgage was recorded securing a principal debt of \$278,189.00, and a mortgage recording tax of \$4,173.00 was paid on recordation. On the same date of recordation of the wrap-around mortgage, there was an outstanding balance of \$721,811.00 remaining on the two mortgages previously recorded on May 10, 1976 and July 13, 1979, as detailed in subparagraphs “(a)” and “(b)” of this finding of fact, respectively, so that total outstanding recorded indebtedness on February 29, 1984 was \$1,000,000.00.

12. On April 16, 1992, 84 Equities Inc. refinanced its debt which gave rise to the present dispute. On this date, 84 Equities Inc. executed a mortgage in favor of Queens County Savings Bank securing a principal debt of \$492,672.00, and a mortgage recording tax of \$9,854.00 was paid on its recordation on May 11, 1992. Although the sum of \$492,672.00 was loaned as a result of this mortgage, only \$361,265.00 was advanced to J & M Realty, the holder of the

purchase money wrap-around mortgage dated January 31, 1984 in the amount of \$278,189.00 as noted in subparagraph “(c)” of Finding of Fact “11”. On May 11, 1992, when the Queens County Savings Bank mortgage was recorded, there was an outstanding balance of \$868,593.00 remaining, according to an affidavit dated May 6, 1994 of Lawrence Krasne, the vice-president of 84 Equities Inc., “of the Purchase Money wrap-Around Mortgage recorded on February 29, 1984.” However, the mortgage in the amount of \$278,189.00 was also described by Mr. Krasne in this affidavit as a purchase money wrap-around mortgage. Although the record is not clear, it would appear that the mortgage indebtedness in the amount of \$278,189.00 as well as the indebtedness totaling \$721,811.00, which remained on the two mortgages recorded on May 10, 1976 and July 13, 1979, respectively were secured by the purchase money wrap-around mortgage recorded on February 29, 1984.

13. 84 Equities Inc. filed a claim for refund dated May 9, 1994<sup>7</sup> for \$7,226.00 of the mortgage recording tax paid of \$9,854.00. It provided the following statement in support of its claim:

1. On April 16, 1992 (recording date of May 11, 1992) the *underlying first mortgage* was refinanced as follows:

(i) new underlying first mortgage	\$1,000,000.00
(ii) less: existing underlying 1st mortgage	(129,468.00)
(iii) less: existing underlying 2nd mortgage	(377,860.00)
(iii) [sic] increase of underlying first mortgage	\$ 492,672.00

Since the wraparound mortgage balance immediately prior to the above refinancing was \$868,593, the outstanding property indebtedness increased by only \$131,407, and the correct mortgage tax due is \$2,628.00 (\$131,407 X 2%). Nevertheless, a mortgage recording tax in the amount of \$9,854 was paid as a result of the above refinancing.

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<sup>7</sup> The day in May of 1994 is speculative given the poor quality of the photocopy submitted.

2. Pursuant to [the court decision in *City of New York v. Tax Appeals Tribunal* (231 AD2d 267, 660 NYS2d 753) which affirmed the decision of the Tax Appeals Tribunal in *Matter of 11814 Homes Corporation* (April 4, 1996)], the refinancing of the underlying first mortgage, without an increase to the wraparound mortgage, will not result in an additional mortgage tax.

3. Accordingly, a refund of \$7,226 is requested.  
(Emphasis in original.)

14. By an order of refund dated July 16, 1998, the Division directed that a refund of \$7,226.00 plus interest was warranted on the basis that the claim of 84 Equities Inc. “was held in abeyance by the Department of Taxation and Finance pending the outcome of litigation in the *Matter of 11814 Homes Corporation*” and such litigation resulted in an order to refund tax and interest to the mortgagor. The Division noted that “the facts and circumstances surrounding the claim for refund [of 84 Equities Inc.] are similar to those in the *Matter of 11814 Homes Corporation* (DTA 811902).”

***9602 Owners Corp.***

15. The following summarizes the relevant mortgages recorded with respect to 9602 Fourth Avenue in Brooklyn, the premises owned by 9602 Owners Corp., up to the time of the refinancing of the underlying first mortgage by 9602 Owners Corp. on December 19, 1994.

(a) On May 24, 1962, a mortgage executed by Coledo Realty Corp. in favor of Home Title Guaranty Company was recorded securing a principal debt of \$725,000.00, and a mortgage recording tax of \$3,625.00 was paid<sup>8</sup> on recordation.

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<sup>8</sup> Unlike his allegations in his other three affidavits noted in this determination, in his affidavit dated December 18, 1996 filed with the claim for refund of 9602 Owners Corp., Lawrence Krasne stated that mortgage recording tax was “presumably” paid with regard to the mortgages recorded prior to the refinancing by 9602 Owners Corp. at issue. The record does not explain why Mr. Krasne has conditioned his statement of payment of mortgage recording tax with regard to this particular claimant and not the other three. Since there is no evidence counterweighing Mr. Krasne’s statements that mortgage recording taxes were “presumably” paid on the recordation of the earlier mortgages, a finding has been made above that such taxes were, in fact, paid.

(b) On January 16, 1963, a mortgage executed by Coledo Realty Corp. in favor of Home Title Guaranty Company was recorded securing a principal debt of \$125,000.00, and a mortgage recording tax of \$625.00 was paid on recordation. On January 16, 1963, there was an outstanding balance of \$725,000.00 remaining of the mortgage previously recorded on May 24, 1962, detailed in subparagraph “(a)” in this finding of fact, so that the total outstanding recorded indebtedness was \$850,000.00.

(c) On January 20, 1963, a mortgage executed by Coledo Realty Corp. in favor of Troby Associates was recorded securing a principal debt of \$200,000.00, and a mortgage recording tax of \$1,000.00 was paid on recordation. On January 20, 1963, there was an outstanding balance of \$850,000.00 remaining of the mortgages recorded on May 24, 1962 and January 16, 1963, as detailed in subparagraphs “(a)” and “(b)”, respectively, of this finding of fact, so that the total outstanding recorded indebtedness was \$1,050,000.00.

(d) On August 20, 1971, a mortgage executed by E.H.B. Enterprises Inc. in favor of The Franklin Society Federal Savings and Loan Association was recorded securing a principal debt of \$217,027.00, and a mortgage recording tax of \$2,713.00 was paid on recordation. On August 20, 1971, there was an outstanding balance of \$782,973.00 remaining of the mortgages recorded on May 24, 1962, January 16, 1963 and January 20, 1963, as detailed in subparagraphs “(a)”, “(b)”, and “(c)”, respectively, of this finding of fact, so that the total outstanding recorded

indebtedness was \$1,000,000.00 as reflected in a consolidation<sup>9</sup> of the four mortgages which was also recorded on August 20, 1971.

(e) On June 3, 1987, a mortgage executed by Shefa Realty Associates in favor of First Nationwide Savings was recorded securing a principal debt of \$1,189,282.00, and a mortgage recording tax of \$26,759.00 was paid on recordation. On June 3, 1987, there was an outstanding balance of \$610,718.00 remaining of the mortgages recorded on May 24, 1962, January 16, 1963, January 20, 1963, and August 20, 1971, as detailed in subparagraphs “(a)”, “(b)”, “(c)”, and “(d)”, respectively, of this finding of fact, so that the total outstanding recorded indebtedness was \$1,800,000.00 as reflected in a consolidation of the five mortgages which was also recorded on June 3, 1987.

(f) A purchase money wrap-around mortgage dated November 24, 1987 was executed by 9602 Owners Corp. in favor of Shefa Realty Associates pursuant to a plan to convert the premises at 9602 Fourth Avenue in Brooklyn to cooperative ownership. On February 19, 1988, this purchase money wrap-around mortgage was recorded securing a principal debt of \$453,942.00, and a mortgage recording tax of \$10,213.00 was paid on recordation. On February 19, 1988, there was an outstanding balance of \$1,796,058.00 remaining of the consolidated mortgage recorded on June 3, 1987 so that total outstanding recorded indebtedness on February 19, 1988 was \$2,250,000.00.

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<sup>9</sup> In his affidavit dated December 18, 1996 filed with the refund claim of 9602 Owners Association, Lawrence Krasne noted that “following the consolidation recorded on August 20, 1971, in Reel 502, Page 1501, the total outstanding recorded indebtedness was \$1,000,000.00.” The record does not explain why in certain instances, a consolidation of mortgages was recorded while in others, a consolidation might not have been. Mr. Krasne in his various affidavits did not always state that consolidations were recorded when there were multiple mortgages on the same premises.

(g) On December 19, 1994, 9602 Owners Corp. refinanced its debt which gave rise to the present dispute. On this date, 9602 Owners Corp. executed a mortgage in favor of Bankers Federal Savings FSB securing a principal debt of \$405,891.00, and a mortgage recording tax of \$8,118.00 was paid on its recordation on January 20, 1995. The sum of \$405,891.00 was advanced to Shefa Realty Associates, the holder of the purchase money wrap-around mortgage dated November 24, 1987 in the amount of \$453,942.00, as noted above in subparagraph “(f)” of this finding of fact. On the same recordation date of January 20, 1995, a consolidation of mortgages was also recorded with total outstanding recorded indebtedness remaining the same, i.e., \$2,250,000.00.

16. 9602 Owners Corp. filed a claim for refund dated December 18, 1996 for the mortgage recording tax paid of \$8,118.00. It provided the following statement in support of its claim:

1. Upon transfer of [9602 Fourth Avenue in Brooklyn], the required mortgage tax was paid upon the recording of a *wraparound* mortgage in the principal amount of \$2,250,000 [sic<sup>10</sup>].

2. On December 19, 1994, (recording date of 1/20/95), the *underlying first mortgage* was refinanced, as follows:

(i) new underlying first mortgage	\$2,100,000.00
(ii) less: existing underlying first mortgage	(1,694,109.00)
(iii) increase of underlying first mortgage	\$405,891.00

However, the wraparound mortgage was not increased, and the total property indebtedness remained at \$2,250,000. Nevertheless, a mortgage recording tax in the amount of \$8,118 was paid as a result of the above refinancing.

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<sup>10</sup> As noted in Finding of Fact “15”, mortgage recording tax of \$8,118.00 was paid on the recording of a mortgage which secured the principal indebtedness of \$405,891.00. In his affidavit dated December 18, 1996 filed with the refund claim of 9602 Owners Corp., Lawrence Krasne referred to a consolidation of mortgages also recorded on January 20, 1995 which reflected total outstanding recorded indebtedness of \$2,250,000.00. The reference above to a wraparound mortgage in the principal amount of \$2,250,000.00 is another example of the usage of varying terminology in Mr. Krasne’s affidavits which has made for a confusing record, especially given the failure of the parties to submit readable copies of the various mortgages referenced by them.

3. Pursuant to [the court decision in *City of New York v. Tax Appeals Tribunal* (231 AD2d 267, 660 NYS2d 753) which affirmed the decision of the Tax Appeals Tribunal in *Matter of 11814 Homes Corporation* (April 4, 1996)], the refinancing of the underlying first mortgage, without an increase to the wraparound mortgage, will not result in an additional mortgage tax.

4. Accordingly, a refund of \$8,118 is requested.  
(Emphasis in original.)

17. By an order of refund dated July 16, 1998, the Division directed that a refund of \$8,118.00 plus interest was warranted on the basis that the claim of 9602 Owners Corp. “was held in abeyance . . . pending the outcome of litigation in the *Matter of 11814 Homes Corporation*” and such litigation resulted in an order to refund tax and interest to the mortgagor. The Division noted that “the facts and circumstances surrounding the claim for refund [of 9602 Owners Corp.] are similar to those in the *Matter of 11814 Homes Corporation* (DTA 811902).”

18. A review of the documents submitted by the parties with reference to the refinancing of debt in each of the four transactions at issue does not show that the respective cooperative housing corporations executed a *second* mortgage or a new loan in favor of the respective sponsors. In their answering brief, the cooperative housing corporations rejected the contention made by the City of New York in its initial brief that each of the four cooperative housing corporations also executed a second mortgage. They described the City’s contention as fictitious, as noted in paragraph “20” below. In reply, the City of New York contended that certain subordination agreements represented second mortgages or new loans and it pointed to an example in the document marked into the record as the City of New York’s Exhibit “1”. Unfortunately, the photocopy of the relevant pages of Exhibit “1”, i.e., pages 36 to 38, are not easily deciphered given the poor quality of the photocopy. These pages, according to the City of New York, represented a so-called “subordination agreement” made on December 19, 1994



between J & M Realty Associates and Imperial Ocean Corp. By a letter dated February 3, 2000, the administrative law judge requested that the City of New York provide copies of the so-called “subordination agreements” which it contended represented second mortgages subject to mortgage recording tax. By a letter dated February 18, 2000, the City of New York submitted photocopies of the following four documents:

(1) An *extension agreement* dated December 19, 1994 between J & M Realty Associates and Imperial Ocean Corp. which extended until January 3, 2007 the time “of payment of the principal indebtedness secured by [the mortgage dated November 22, 1988 made by Imperial Ocean Corp. to J & M Realty Associates in the principal sum of \$3,000,000.00].” This extension agreement also included a paragraph “19” which provided as follows:

The Mortgage as extended herein is subject and subordinate to a consolidated first mortgage in the total consolidated principal amount of \$2,500,000.00, and shall continue to be subject and subordinate to all loans, advances, reloans, modifications and extensions of said first mortgage.

(2) A *subordination agreement* dated August 7, 1991 between B & K Realty Associates and Queens County Savings Bank<sup>11</sup> by which B & K Realty Associates agreed to subordinate the wrap-around mortgage (and the bond or note secured thereby) in the principal sum of \$1,000,000.00 held by it, which had been made by Marion Court Equities Corp. on July 25, 1983. B & K Realty Associates agreed that this mortgage would be “subordinate in lien to the lien [resulting from a mortgage to secure the principal sum of \$1,200,000.00 soon to be executed by Marion Court Equities Corp. to Queens County Savings Bank].”

(3) An *extension agreement* dated December 19, 1994 between Shefa Realty Associates and 9602 Owners Corp. which extended until January 10, 2007 the time “of payment of the

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<sup>11</sup> The cooperative housing corporation, Marion Court Equities Corp., is not a party to this agreement.

principal indebtedness secured by [the mortgage dated November 24, 1987 made by 9602 Owners Corp. to Shefa Realty Associates in the principal sum of \$2,250,000.000].” This extension agreement also included a paragraph “19” which provided as follows:

The mortgage as extended herein is subject and subordinate to a consolidated first mortgage in the total consolidated principal amount of \$2,100,000.00 and shall continue to be subject and subordinate to all loans, advances, reloans, modifications and extensions of said first mortgage.

(4) *A consolidation, modification and extension agreement* dated April 16, 1992 between Queens County Savings Bank and 84 Equities, Inc. which consolidates the following three mortgages: (i) mortgage dated May 4, 1976 made by Jambi Realty Inc. to Harwood Construction Company, Inc. in the principal amount of \$370,000.00, which mortgage “is being further assigned to Queens County Savings Bank by Assignment dated April 15, 1992 . . . upon which mortgage there is now due and owing the principal amount of \$129,467.41,” (ii) mortgage dated June 28, 1979 made by 63 Associates, Inc. to Anton Vatauvuk in the principal amount of \$434,618.83, which mortgage “is being assigned to Queens County Savings Bank by Assignment dated April 8, 1992 . . . upon which mortgage there is now due and owing the principal amount of \$377,860.35,” (iii) mortgage dated April 16, 1992 made by 84 Equities, Inc. to Queens County Savings Bank in the principal amount of \$492,672.24. Pursuant to this agreement, these three mortgages were consolidated into “but one joint lien and first mortgage upon the premises . . . securing the payment of the sum of [\$1,000,000.00].” This agreement also includes the following subordination provision:

There shall be no further secondary financing without [the approval of Queens County Savings Bank], except for the subordiante [sic] financing approved by [the bank] of an existing wraparound mortgage in the amount of \$1,025,000.000, held by J & M Realty Associates.

***SUMMARY OF THE PARTIES’<sup>12</sup> POSITIONS***

19. The City of New York maintains that upon the refinancing of their debt, each of the four cooperative housing corporations also executed a “second mortgage [which] was collateral to the mortgage taken by the bank in the subsequent refinancing transaction” (Petitioner’s brief, p. 32). The second mortgage, the City argues, “secured that part of the Wrap Mortgage debt for which the lien was relinquished to the bank” (Petitioner’s brief, p. 4), and the second mortgage was a “new loan” which did not merely “furnish additional security for the original wrap loan, in order to ‘perfect’ or complete that transaction” (Petitioner’s brief, p. 28). According to the City of New York, mortgage recording tax on this so-called “second mortgage” should be recouped against any refund payable on the bank’s mortgage. It summarizes its position as follows:

[The sponsor’s second mortgage] was not collateral to the primary Wrap Mortgage, securing the Sponsor’s wrap loan, taken in the prior Wrap Mortgage transaction. Therefore, if, as the City argued in the previous 11814 Homes litigation, the recording officer properly collected the tax on the mortgage recorded by the bank, the Sponsor’s second mortgage, collateral to that later mortgage, is not subject to the tax.

However, if, as the Tribunal held in that earlier decision, the mortgage recorded by the bank to secure its new loan was not subject to the tax, because tax was already paid on the prior mortgage given to secure that later loan, then the Sponsor’s second mortgage clearly imposes a new lien, to secure the prior debt, and was taxable upon recordation. Otherwise tax is permanently avoided on one of the liens, where, as here, there are two liens, resulting from two transactions, securing two separate obligations payable to two different parties.

When the entire transaction is considered, equity requires that the tax be recouped against any refund payable on the mortgage recorded by the bank, otherwise, the City (and the taxing authority) will be whipsawed.

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<sup>12</sup> The Division of Taxation did not submit a brief setting forth any legal arguments. Rather, it chose to rely upon the brief submitted by attorney Freidenberg on behalf of the true parties in interest, the mortgagors who were granted refunds of mortgage recording taxes by the Department of Taxation and Finance, i.e., Imperial Ocean Corp. (DTA #816772), Marion Court Equities, Inc. (DTA #816773), 84 Equities Corp. (DTA #816774) and 9602 Owners Corp. (DTA #816775).

(Petitioner's brief, pp 32-33.)

20. The four cooperative housing corporations in their answering brief maintain very simply that “there is nothing in the record presented by the Petitioner which shows that any such new second mortgage even exists or for that matter was ever recorded,” and they describe the City of New York's argument concerning the creation of new second mortgages as “fictitious” (Cooperative housing corporations' brief, p. 2). According to these taxpayers, “[t]he issue presented in these cases has already been litigated in [*City of New York v. State Tax Commn*, (130 AD2d 890, 516 NYS2d 132), and in *Matter of 11814 Homes* (Tax Appeals Tribunal, April 4, 1996, *confirmed* 231 AD2d 267, 660 NYS2d 753)] and decided in favor of the taxpayers.

21. The City of New York in its reply brief points to a so-called “subordination agreement” as a new mortgage on which mortgage recording tax should have been paid upon recording. In addition, the City revisited its arguments, rejected by the Tribunal in *Matter of 11814 Homes* (*supra*).

### **CONCLUSIONS OF LAW**

A. As noted in the findings of fact, each of the refund claims of Imperial Ocean Corp., Marion Court Equities Corp., 84 Equities Inc., and 9602 Owners Corp. were held in abeyance pending the outcome of litigation in *Matter of 11814 Homes Corporation* (Tax Appeals Tribunal, April 4, 1996, *confirmed sub nom. City of New York v. Tax Appeals Tribunal* 231AD2d 267, 660 NYS2d 753). The Division correctly held these four refund claims in abeyance because the facts and circumstances surrounding the claims of these four cooperative housing corporations are similar to those involving the three cooperative housing corporations in *Matter of 11814 Homes Corporation* (*supra*). Consequently, the Division correctly directed refunds to the four cooperative housing corporations herein upon the decision of the Appellate

Division noted above which confirmed the decision of the Tax Appeals Tribunal refunding mortgage recording tax plus interest to the three cooperative housing corporations involved in the litigation in *Matter of 11914 Homes Corporation (supra)*.

B. In *Matter of 11814 Homes Corporation (supra)*, the Tax Appeals Tribunal rejected the City of New York's position that a new mortgage, pursuant to which funds are advanced and used to pay off part of the principal secured under an earlier wraparound mortgage lien, is taxable, for purposes of mortgage recording tax, upon the amount of such new funds:

[T]he mere substitution of one mortgage for another, which does not secure repayment of any additional indebtedness, does not create a new mortgage subject to tax under Article 11. This principle applies even where a new mortgagee is substituted for an old mortgagee (*see, Matter of City of New York v. Procaccino*, 46 AD2d 594, 364 NYS2d 582; *Matter of Fifth Ave. & 46<sup>th</sup> St. Corp. v. Bragalini*, 4 AD2d 387, 165 NYS2d 312; *Matter of Jeffrey Park, Ltd.*, Tax Appeals Tribunal, January 4, 1996). The City's interpretation of 'new funds' would overturn this body of case law by holding that a substituted mortgage is taxable as a new mortgage whenever proceeds advanced under the new instrument are used to pay principal secured by the prior mortgage.

C. As noted in Finding of Fact "9" and "13", to the extent that Marion Court Equities Corp. and 84 Equities Corp., respectively, created additional indebtedness as a result of their refinancings, mortgage recording taxes allocable to such additional indebtedness have not, in fact, been ordered refunded by the Division. To the extent that the refinancings at issue did not increase indebtedness, mortgage recording taxes were properly ordered refunded. The principle of *stare decisis* requires such refunds because the facts in the matters at hand are the same as the relevant facts in *Matter of 11814 Homes Corporation (supra)*. In *Matter of Marine Midland Bank, N.A.* (Tax Appeals Tribunal, May 13, 1993), the Tribunal in applying the principle of *stare decisis*, noted the following definition:

*Stare decisis*, briefly, is the doctrine 'that, when [the] court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that

principle, and apply it to all future cases, where facts are substantially the same' (Black's Law Dictionary 1261 [5<sup>th</sup> ed 1979]).

D. Furthermore, as noted in Finding of Fact "18", petitioner has failed to establish that the four cooperative housing corporations herein executed second mortgages, by which they incurred additional indebtedness so that they are liable for additional mortgage recording taxes. The answering brief of the cooperative housing corporations is correct in describing the City of New York's argument concerning the creation of new second mortgages as "fictitious." In fact, the meritless nature of the City's position is exemplified by the fact that Marion Court Equities Corp. was not even a party to the agreement which the City argued represented a second mortgage by this cooperative housing corporation.

E. The petitions of the City of New York are denied, and the orders granting refunds of mortgage recording tax with reference to instruments recorded on January 12, 1995, August 23, 1991, May 11, 1992 and January 20, 1995 are sustained.

DATED: Troy, New York  
April 13, 2000

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE